Supreme Court of the United States

OCTOBER TERM, 1944

No. 788

HARRY BRIDGES,
Petitioner,

against

I. F. WIXON, as District Director, Immigration and Naturalization Service, Department of Justice.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH COURT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

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Statement of the Case

The background of this deportation proceeding is amply set forth in petitioner's brief (pp. 5-13). We shall, therefore, merely outline the unique history of Harry Bridges as it relates to the continuous efforts of the government, both in the executive and legislative branches, to deport him for alleged membership in or affiliation with organizations purportedly disloyal.

In 1934 efforts were first commenced to deport petitioner, but upon investigation by the Immigration Service

no grounds were shown to exist and the matter was thereupon dropped. Thereafter in March, 1938 a warrant was issued by the Service seeking his removal from the country. In 1939, however, after a full hearing before a special trial examiner, Dean James M. Landis, again no grounds were found to expel Bridges under the law as it existed at that time, which as interpreted by this Court in *Kessler* v. *Stecker*, 307 U. S. 22, permitted deportation only for membership in proscribed organizations at the time of arrest, and the warrant was withdrawn.

The next attempt to banish Bridges was the introduction and passage in the House of Representatives of a special bill (H.R. 9766, 76th Congress, 3rd Session) specifically directing the Attorney General to deport him. Calmer heads prevailed in the Senate, however, where it died in the Committee on Immigration.

As a substitute, however, for that special bill, Congress adopted Section 23 of the Alien Registration Act of June 28, 1940 (54 Stat. 673) which provided for the deportation of any alien who either at the time of entrance into the United States or at any time thereafter was a member of or affiliated with certain proscribed groups and organizations (8 U.S.C.A. Section 137g).

In February 1941 a warrant for Bridges' deportation was issued under color of the new statute, and a new series of hearings held before another special trial examiner, Judge Charles B. Sears. Upon this hearing, grounds were found to expel Bridges, but the recommendations were rejected by a unanimous vote of the Board of Immigration Appeals in January 1942, which in turn was overruled by the Attorney General in May 1942, who thereupon ordered his deportation.

Interest of the American Civil Liberties Union

The American Civil Liberties Union is a nationwide organization, membership in which is open to all, rich and poor, alien and citizen. In our view the protection of the Bill of Rights should be accorded all persons in the United States. Consistently we have maintained that aliens as well as citizens, whether naturalized or native born, alike are entitled to civil liberty. Thus in *Bridges* v. *California*, 314 U. S. 252, we filed a brief *amicus curiae* in this Court, recognizing that aliens no less than citizens should be afforded freedom of speech in criticizing judicial opinions. But even if we did not adopt such a position, which has received the approbation of this Court, we would nevertheless feel constrained to file a brief *amicus* in this case in view of its history as outlined above. For it is apparent that surrounding this proceeding is an aura of persecution for the alleged holding of unpopular beliefs by this petitioner.

In any event to concede the plenary power of Congress to deport aliens within the country for alleged political beliefs for which citizens could not constitutionally be punished is to open the door to the penalty of banishment, which could easily be extended to citizens. It is clear then that if the civil liberties of the alien minority are attacked those of the citizens majority are also in jeopardy.

POINT I

Whether or not the power of Government to exclude aliens is subject to constitutional restraint, the deportation of aliens, lawfully and permanently residing in the United States, is subject to the basic limitation imposed upon governmental action by the Bill of Rights.

The government's basic contention, and indeed the main issue in the present case, is that "the power of deportation has the same basis as the power of exclusion", that the constitutional restraints upon the powers of government embodied in the Bill of Rights and particularly in the First Amendment are "inapplicable" to the exercise of "the plenary power of Congress to exclude or to deport aliens"; and that "the admission of an alien confers upon him, prior to naturalization, *but a license to remain that is terminable at the will of Congress*" (Government's brief below, pp. 17, 21; italics added).

We submit that these contentions are based upon a deep misconception of the true nature of constitutional restraints and of the legal and political positions of aliens lawfully residing in this country.

Whatever the plenitude of congressional power as to the exclusion of aliens, basic sociological as well as legal considerations prevent the identification of the scope of the power to exclude with that of the power to deport. The social structure of this country has, since its foundation, been such that every alien lawfully admitted to its shores for the purpose of permanent residence has of necessity been regarded as a *potential citizen*. This is "a country whose life blood came from an immigrant

stream" (*Ex parte Kumezo Kawato*, 317 U. S. 69, 73), inhabited by "a heterogeneous people" (*Schneiderman* v. *United States*, 320 U. S. 118, 120), "by millions of immigrants who have learned to love the country of their adoption more than the country of their birth" (*Ex parte Kumezo Kawato, supra, ibid.*).

In a country in whose larger cities "a majority of the school children are offspring of parents only one generation, if that far, removed from the steerage of the immigrant ship" (*Schneiderman* v. *United States, supra*, 120), naturalization of aliens must be treated as one of the essential tasks of the community. Nor must naturalization be thought of as an instantaneous act fully accomplished at the moment of the swearing in of an alien. On the contrary, it is a long, complex and delicate process of social adjustment and political education. In this process, governmental action plays as important a role as any social factor making for the success or failure of the process of Americanization. It would be absurd to suppose that during this decisive and formative period of political education of potential citizens, they may be exposed to a governmental action completely free and unrestrained in its exercise. Aliens who have been excluded from the United States, who have never been admitted to the community, may be in some circumstances the victims of crude governmental arbitrariness. As such, they deserve our humanitarian sympathy. But—and this is essential for the distinction between exclusion and deportation—their fate will exercise no direct influence upon the social structure of the American *polis* itself, to whose life they had never been admitted for a single instant.

Totally different is the legal position of immigrants, lawful and permanent residents of the country. Their

exposure to the potentialities of a constitutionally unrestrained governmental action could not fail to exercise a deeply detrimental effect upon an integral part of the national community and thus upon the community at large. Just as the events of prenatal life of an infant may prove decisive in the formation of its physical and psychological traits, pre-citizen years of immigrants may prove decisive for the formation of their political character. Serfdom is no education for freedom.

The facing of the breath-taking alternative between acquisition of "the priceless benefits that derive from the status (of American citizenship)", regarded by many "as the highest hope of civilized men" (*Schneiderman* v. *United States, supra,* 122), and the crushing sanction of deportation—is not the proper training for citizenship of a free country.

American law would not have kept faith with American history and with the realities of American society if it had not reflected and embodied these ideas. This Court has explicitly recognized that despite the sweeping reception of the Common Law of England, some of its rules concerning aliens were never received in this country. One of these rules concerns a very special class of aliens, namely those owing allegiance to countries actually at war with the United States. Still as early as 1813, Chancellor Kent felt that the peculiarities of the American Commonwealth made it unwise to receive the strict English rule barring such aliens from courts (*Clarke* v. *Morey,* 10 Johns. 69). Kent's doctrine has been followed in a number of state and federal decisions. Recently, in a case involving an interned enemy alien who, under the prevailing statute, could never become a citizen (*Ex parte Kumezo Kawato, supra*), Mr. Justice Black applied the same "sound prin-

ciple of the (American) common law" (*Ex parte Kumezo Kawato, supra,* at p. 75). Speaking for a unanimous court, Justice Black predicated the rule upon the contributions "made in peace and war by the millions of immigrants" and placed the decision upon the broadest possible ground, touching the constitutional plane, by asserting that any harsher treatment even of enemy aliens "would be repugnant to sound policy no less than to justice and humanity" (*Ex parte Kumezo Kawato, supra,* at p. 74).

In the light of decisions dealing with the legal position of interned enemy aliens or with the constitutional position of belligerent enemies,[1] it is hardly surprising that a much greater range of constitutional protection, going beyond access to courts or the right to trial by jury, has been accorded to friendly aliens, lawful residents of the country, who have filed—as petitioner Bridges had done three times—their declaration of intention to become a citizen.

The structure of most communities is too complex to admit a clear-cut distinction between insiders and outsiders, citizens and aliens, without the need for some intermediate class or classes of "novitiates". Even a comparatively static society as that of England, for example, has long felt the need for the category of *denizens,* persons in an intermediate position between that of natives and that of aliens (1 Bla. Comm. 374). For the distinction be-

1. Belligerent enemies were granted the right to sue in American courts in *Ex parte Quirin,* 317 U. S. 1. Mr. Chief Justice Stone said that "Neither the Proclamation nor *the fact that they are enemy aliens forecloses consideration by the courts of petitioners, contending that the constitution and laws of the United States constitutionally enacted forbid their trial by military commission*" (at p. 25) and assumed that some acts recognized as offenses against the law of war would not be triable by military commissions here "because they are of that class of *offenses constitutionally triable only by a jury*" (at p. 29). (Italics added.)

tween denization and naturalization see *Dicey, Conflict of Laws*, 164. This Court has drawn an analogous conclusion from American history and from the system of common and statutory law dealing with permanent immigration, requests and grants of "first papers", military and fiscal duties of immigrants, when it spoke of the category of "novitiates" in *Schneiderman* v. *United States, supra*, 158. The constitutional and political necessity to preserve "for novitiates as well as citizens the full benefit of that freedom of thought which is a fundamental feature of our political institutions", amidst which the newcomers have hoped to achieve the status of people "privileged to think and act and speak according to their convictions" (*ibidem*) requires a uniform construction of the congressional intent both in the field of naturalization and in that of deportation. In neither field should we "tread so close to the domain of freedom of conscience without an explicit mandate of Congress." Mr. Justice Douglas, concurring in *Schneiderman* v. *United States, supra* at p. 165. Lest the atmosphere of the community as a whole be poisoned and the process of Americanization frustrated in its initial decisive phases, neither the new citizen nor the "novitiate", the citizen-to-be, must be placed in a situation in which "he could not open his mouth without fear" and in which "his best course would be silence or hypocrisy". Mr. Justice Rutledge, concurring in *Schneiderman* v. *United States, supra*, at p. 167. *Cf.* Mr. Justice Murphy in *Bridgartner* v. *U. S.*, 322 U. S. 665, 679 "the naturalized citizen * * * is not required to imprison himself in an intellectual or spiritual straitjacket." "This is not citizenship" *Schneiderman* v. *U. S., supra*, 167. Nor is it preparation for it.

The enjoyment of the basic constitutional rights must therefore be afforded to natural-born and naturalized, actual and prospective citizens alike. In the light of this principle the Court will assume that Congress did not intend to authorize the deportation for mere belief unless the expression thereof is shown to create a clear and present danger of public disorder or other substantive evil. "Such a construction of the statute is to be favored because it preserves for novitiates as well as citizens the full benefit of that freedom of thought which is a fundamental feature of our political institutions". *Schneiderman* v. *United States, supra,* 158. *A fortiori* should deportation for mere *supposed* membership in or affiliation with *allegedly* subversive organizations be denied on constitutional grounds. *Cf.* Mr. Justice Jackson in *Korematsu* v. *U. S.*, —— U. S. —— (Oct. Term, 1944).

POINT II

Whether or not "deportation of aliens" is always a penalty, the deportation of an alien predicated solely upon §23 of the Alien Registration Act of 1940, is clearly punitive in nature and subject to all constitutional restraints regarding imposition of punishment.

The difficulty of drawing a clear line of distinction between merely civil or administrative sanctions on the one hand and punitive sanctions on the other is equalled by the great importance that the distinction itself possesses for the purposes of constitutional jurisprudence.[2] It has

2. "Civil and criminal law overlap so that it is impossible to say with absolute precision where one begins and the other ends." Morris R. Cohen, "On Absolutisms in Legal Thought" (1936) 84 U. of P. Law Review 681, 686.

long been recognized that "the words 'penal' and 'penalty' • • • are elastic in meaning" (*Huntington* v. *Attrill*, 146 U. S. 657), and that no governmental sanction is *in itself* either a punishment or a non-criminal sanction. Even death may be lawfully inflicted by the agents of government without being a punishment. The killing of a gangster by a policeman while the gangster threatens to kill the victim of a hold-up, is a governmental sanction predicated upon the unlawfulness of the gangster's behavior, but is obviously not a punishment. It is rather the exercise of police power, an action in the nature of an administrative, remedial, measure, clearly distinguishable from the imposition of a death penalty.

Analogous examples can be given with respect to any other governmental action, which is generally used as a means of punishment. Thus, the deprivation of freedom applied to *presently* insane and dangerous persons, the compulsion to do work, the destruction of property, real or personal, because of its *actual* threat to safety or health of a community, the exaction of pecuniary contributions for the purpose of actual reparation of *present* harm can and must be characterized as a non-penal sanction, and distinguished from governmental actions, identical in their physical content imposed, as will be seen, for *past* activity or condition, such as imprisonment, forced labor, confiscation or exaction of a fine.[3]

3. It is true, however, that past performances in themselves are a source of legitimate fears of future dangers. But this type of danger is present in almost every situation in which criminal justice intervenes: incapacitation of criminals is one of the recognized secondary functions of punishment. This is why to take a sanction out of the sphere of punishment, something more than this general fear of a second offence must be present. The sanction must be predicated upon this specific danger, in the sense that its existence must be proved and the application *vel non* of the sanction itself must be made clearly dependent upon the existence of such danger. When, on the other hand, the sanction applies *whenever the past violation is proved*, no evidence of future possibility

Punitive and non-punitive sanctions are thus relational terms, implying some relationship between the given governmental action and the situation in which it operates. The analysis of this relation seems clearly to suggest a basic principle which, without offering a universal test of distinction between punitive and non-punitive sanctions, appears to be well founded in universally accepted concepts and sufficient for the solution of the present controversy. This principle[4] is that the category of punitive sanctions comprises at least those measures that are predicated *exclusively* upon *past* and completed situations or actions, without requiring any special relation of such situations or actions to some present or future state of affairs. The execution of the gangster after conviction is predicated upon his past and not upon his future potentialities. It is punishment, because the state is not required to show that it could not incapacitate him otherwise. The killing of a gangster who is threatening his victim is predicated not upon his past, but upon the fear of the future. It is an administrative, remedial, measure and is justified only to the extent that no other ready means of incapacitation was available.[5]

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of harm being required, the sanction is clearly addressed to the retribution for the past, rather than to the prevention of the future and must be recognized for what it is: a punishment and not an administrative measure. To hold otherwise, would transform *all* punishments into administrative measures because of the presence of some secondary effect of prevention of future violations by the person being punished.

4. To avoid another logical fallacy it may be noted that the offered criterion of distinction provides only a minimum description of the sphere of punitive sanctions. It leaves open the question whether under some circumstances, some sanctions, although expressly predicated upon a present state of affairs, may still be punitive in nature. All it says—and all that is needed for the present case—is that at least where no reference to a presently existing unlawful or dangerous situation is made by the law, the applicable sanction must be characterized as penal.

5. This distinction clearly underlies judicial pronouncements where penalty is to be distinguished from remedial sanctions. Everytime a court finds that a given sanction is *remedial* rather than *penal* in nature it administers it with

This general principle of characterization suffers no exception in respect to deportation. What is true in respect to sanctions consisting in physical destruction of life or property and in deprivation of freedom or values, is equally true with respect to an action consisting in the forcible expulsion of an individual from a country. Like death or detention, deportation may or may not be a penalty. Like the other distinctions between administrative and punitive sanctions, the line of demarcation between "administrative deportation" and "punitive deportation" may not be easy to draw.[6] But logical difficulties should

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regard not to the *past* but to the *present*, and indeed sometimes *future* situation. "Dissolution is not a penalty but a remedy". Judge Learned Hand stated in *U. S.* v. *Aluminum Co.*, decided under §4 of Title 15 U. S. C. A., on March 12, 1945. Therefore, he held dissolution cannot be applied without taking into account "the changes that have taken place", especially "Alcoa's position in the industry after the war." If the industry "will not need it for its protection", dissolution should not be ordered. To do so only because of the past, *i.e.*, only because Alcoa ***had been*** a monopoly ***at some time***, would make dissolution a penalty, not a remedy.

The United States Constitution (Amendment 13) expressly recognizes this ambivalence of sanctions and the possibility that an identical measure might or might not be used as a punishment when it permits "involuntary servitude" as and only as a "punishment for crime". In this situation non-punitive compulsion is forbidden, and the Government contrary to the case at bar, would have to show that the sanction is not applied for remedial purposes. "If the statute in this case had authorized the employing company to seize the debtor and hold him to the service until he paid the fifteen dollars, or had furnished the equivalent in labor, its invalidity would not be questioned". *Bailey* v. *Alabama*, 219 U. S. 219, 244. The test of distinction is still the same; the pursuit of a result to be obtained in a presently existing setting takes the sanction out of the sphere of punishments.

6. This is not the first time that in the field of deportation Congress has been tempted to cross the line between permissible administrative *remedial* action and non-permissible administrative *punitive* action. 27 Stat. at L. 25 §4 (1892) provided that a Chinese unlawfully in this country could (a) be taken into custody by immigration officers and (b) imprisoned for a period not exceeding one year. This Court held that "detention * * * as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid" but that detention unrelated to the administrative needs was a punishment without trial by jury forbidden by the Constitution. *Wong Wing* v. *U. S.*, 163 U. S. 228. In the case at bar this Court is called upon to make a similar distinction, although predicated on other grounds, between remedial and penal features of deportation.

never excuse the neglect of distinctions, upon which the reality of constitutional guarantees hinge.[7]

Whether or not deportation predicated upon *present* membership in, or *present* affiliation with an alleged subversive organization is a merely administrative measure or a punitive sanction may be open to doubt. As we have stated, the relation to present dangers does not necessarily exclude the punitive nature of sanctions. Furthermore expulsion is certainly one of the most ancient forms of punishment known to the recorded history of mankind. "Primitive society had no penalties but death or exclusion from the community and the latter, as Cain reminded the Almighty, was the equivalent to death" (George W. Kirchwey in 4 Enc. Soc. Sc. 571). But be it as it may, it seems certain that deportation *avowedly unrelated to any present state of affairs, ordered in a situation in which all parties expressly concede that even the most tenuous form of vague affiliation of petitioner Bridges, if existing at all, had been severed long before the present action was begun, and that such deportation is predicated exclusively upon the past,* is and can be only punitive in nature. And at least this punitive deportation operating as a criminal sanction for past offences is within the ex post facto prohibition of the Constitution and may not be applied retroactively to the petitioner.

Thus, strictly speaking, the general scope of, and the limitations upon the power of government to deport for

7. For example, the determination that a "tax" is nothing but a disguised penalty allows the Court to intervene where it would otherwise be powerless. Thus in *Grosjean* v. *American Press Co.*, 297 U. S. 233, this Court, in explaining why the Louisiana tax on periodicals of large circulation violated the due process clause, said: "It is bad because, in the light of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled." See also, *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *U. S.* v. *Constantine*, 296 U. S. 287; *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20; *Hammer* v. *Dagenhart*, 247 U. S. 277.

political beliefs, are not before the court at this time. Even the question whether or not Congress may impose the sanction of punitive deportation for past affiliations, severed before the proceedings, need not be decided here. To reverse the decision below it will suffice to hold that deportation avowedly predicated upon facts totally unrelated to any present situation, may not be ordered *retroactively*. In other words, strictly speaking, the constitutionality of "deportation-for-past-affiliation"—amendment, embodied in §23 of the Act of June 28, 1940 is not in question: all that is needed to free the petitioner is to deny the possibility of *retroactive application*.

POINT III

Whether or not deportation of aliens because of their present membership in, or association with certain proscribed associations can be justified by a reliance upon an implied legislative finding that the presence of such aliens is a clear and present danger of substantive evils—the presumption of such finding cannot be applied to the special case provided for in §23 of the Alien Registration Act of 1940, upon which the deportation of the petitioner is solely predicated.

The Government argues that the "clear and present danger" test of *Schenck* v. *United States*, 249 U. S. 47, does not prevent the deportation of aliens based on their affiliation with allegedly subversive organizations because, as in the case of *Dunne* v. *U. S.*, 138 F. (2d) 137 (C.C.A. 8), "Congress has made the determination of clear and present danger" (Government's brief below, p. 21). The gist of the contention is that this Court should construe

the statute authorizing deportation for membership in, or affiliation with, a subversive organization as containing the implied congressional finding of clear and present danger. It is highly doubtful whether the court should accede to the notion that the clear and present danger test is satisfied whenever Congress makes the finding of its existence. The very essence of judicial protection of civil liberties would be destroyed if findings by other branches of government were held conclusive under all circumstances. It is even more doubtful whether in situations involving essential political freedom the court should declare itself satisfied with a mere assumption of *implied* findings of danger, without even requiring the legislature to take the trouble of an explicit statement.[8] The acceptance of a similar principle would ultimately lead to a situation where every act that could be considered constitutional under some circumstances would be held constitutional *always*, the court imputing to the legislature the implied findings of fact necessary under the court's doctrine, to sustain the act.

But even if the contention of the government is accepted with respect to deportation of aliens in general, it is logically impossible to apply it to deportations predicated upon the 1940 amendment, involved in the instant case. No implied finding of clear and *present* danger can be read into a special statute written with the explicit purpose of dispensing the government from the necessity of showing any *present* connection, no matter how trifling or tenuous, between subversive organizations and the alien

8. Where the attack on official actions is on civil liberties grounds, the usual presumptions in favor of their constitutionality or legality have been largely moderated or discarded. See *U. S.* v. *Carolene Products*, 304 U. S. 144, 152, n. 4; *Schneider* v. *State*, 308 U. S. 147; *Thomas* v. *Collins*, —— U. S. —— (Oct. Term, 1944, No. 14).

to be deported. The record of the instant case embodies the final and not challenged findings of Dean Landis to the effect that petitioner Bridges' affiliation with any subversive organizations, if any, had been severed long before any deportation proceeding was commenced against him. It was for the purpose of making possible the deportation of Bridges *despite this accepted finding* that the Act of June 28, 1940 was adopted by Congress. The gist of the statutory scheme consisted in making all reference to present dangers immaterial, irrelevant and non-pertinent to the triable issues. Whatever the possibilities of sustaining the general power of deportation for belief, it is impossible to rescue the very special, indeed private, *ad personam* statute involved in the instant case, by reading into it an *implied* finding of clear and present danger emphatically inconsistent with this statute's *express* aims and purpose. The "present danger" test cannot be read into a statute written by Congress in obvious defiance of the very doctrine that gave it to that test.

CONCLUSION

We respectfully submit that the petitioner be granted the relief sought, that he be ordered discharged and the warrant of deportation quashed.

Respectfully submitted,

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